INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

De Hart v. *United States*, 237 F. 2d 227	5
Holland v. *United States*, 348 U.S. 121	6
United States v. *Skinner*, 272 F. 2d 607, certiorari denied, 362 U.S. 902	5

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QUESTIONS PRESENTED

1. Whether the evidence supports petitioners' conviction for illegal possession of sugar with intent to violate the revenue laws.

2. Whether the court of appeals treated petitioners' failure to explain the suspicious circumstances surrounding their possession of a large quantity of sugar as affirmative proof justifying an inference that the use for which they intended the sugar was unlawful.

STATEMENT

Petitioners were convicted in the United States District Court for Maryland of conspiracy to possess sugar intended to be used in the production of distilled spirits (18 U.S.C. 371; 26 U.S.C. 5686(a)) and of the substantive offense of unlawful possession of sugar intended for use in violating the Internal Revenue laws (26 U.S.C. 5686(a); 18 U.S.C. 2). Each was sentenced to concurrent terms of imprisonment for one year (R. 23). The court of appeals affirmed the convictions (R. 18).

The evidence may be summarized as follows: Defendant Somers (who pleaded guilty and testified for the government) and defendant Victor (who died before trial) met by prearrangement in Pittsburgh in October 1960 and agreed that Somers would go to work for Victor. Victor explained that he was engaged in purchasing and selling sugar, using the name Allegheny Food Products Company as a front because of the difficulty of obtaining sugar without some kind of business through which it could be disposed of legally. It was arranged that Somers would

set up an office in Baltimore and take charge of purchases and sales of sugar there; that Victor would periodically advise Somers when men from various areas would arrive to pick up sugar; that Somers, after receiving money from these men, would use it to purchase American Express money orders; and that Somers would present the money at the Canton Railroad docks, obtain purchase orders for the sugar, and permit the men to load it. Although Victor did not tell Somers the identity of the men who would pick up the sugar in Baltimore, he did say that they would be selling to bootleggers (App. 36–39).

In November 1960, pursuant to this arrangement, Victor come to Baltimore and stayed with Somers at the Lord Baltimore Hotel. The next morning, at a restaurant, they met petitioners and also a man named Liskie, and Somers was introduced to them as the person with whom they should communicate in the future to purchase sugar (App. 40–41, 43, 46). After a conversation, Victor, Somers, petitioner Williams, and one of the other two men traveled together by cab to the office of the American Express Company. On the way, there was a general conversation about picking up sugar, and petitioner Williams handed a roll of money to Victor (App. 41, 44–46). All of them went into the American Express office, where Victor purchased two money orders, each for approximately $1350. They then returned to the Canton Railroad Yard, where Victor and Somers went into the office, presented the money orders to an employee, and obtained purchase orders for the sugar (App. 42, 44). One of the purchase orders was used for the purchase

of 15,000 lbs. of sugar, which was promptly loaded on a truck operated by Liskie (App. 33–34), who signed the receipt for the sugar. The truck carried Virginia license plates (App. 30–31). While the truck was being loaded, petitioners waited in or near a blue Ford automobile bearing Virginia license plates (App. 30–31), which was later found to be registered in the name of petitioner Ragland (App. 53). From time to time, petitioners were seen to have observed the loading of the sugar, although they took no active part in it. As soon as the truck had been loaded, Liskie drove it away, and petitioners followed in the blue Ford, keeping as close behind the truck as they could without bumping it (App. 31, 35).

Having been previously alerted, an officer of the Maryland State Police followed the truck and the Ford for about three-fourths of a mile, observing that the Ford, operated by Williams with Ragland beside him in the front seat, trailed the truck, operated by Liskie, by only the length of a car or a car and a half. The officer stopped both vehicles near Laurel, Maryland, and took them and their occupants to the Maryland State Police barracks nearby (App. 50–52). The Ford was found to be equipped with heavy-load springs, consisting of a large heavy-duty coil spring with a center shock absorber on the rear axle designed to enable the car to ride level while carrying a heavy load. The rear arr .est had been removed, allowing more room for the rear compartments. Hidden under the curve of the cowl was a switch which would cut off all rear lights and license identification and still leave the front lights operating (App. 54–55). In the

glove compartment were pamphlets distributed by the Alcohol and Tobacco Tax Units in Richmond, Virginia, warning sellers of sugar of its use in the illicit liquor traffic (App. 55–56). Liskie admitted driving the truck and petitioner Ragland admitted ownership of the Ford. None of them made any other statements (App. 54, 56–57).

ARGUMENT

1. Petitioners' challenge to the sufficiency of the evidence presents no issue warranting review by this Court. From all the circumstances shown—the amount of sugar involved, the fact that petitioners were together with the driver of the truck, that petitioner Williams paid for the sugar, that both petitioners observed the truck being loaded and followed it closely thereafter, the unusual equipment in petitioner Ragland's car, the statement of Victor to Somers that the sugar would be sold to bootleggers—the jury had the right to infer that petitioners possessed the sugar with intent that it be used in violation of the internal revenue laws. See *United States* v. *Skinner*, 272 F. 2d 607 (C.A. 2) certiorari denied, 362 U.S. 902; *De Hart* v. *United States*, 237 F. 2d 227 (C.A. 4).

2. In discussing the evidence, the court of appeals noted at several points that petitioners had made no attempt to explain the incriminating circumstances disclosed by the evidence. The court concluded its opinion by declaring (App. to Pet., 11):

> It is our conclusion that the Government's evidence was sufficient in itself to support the jury's verdict. But since the jury also had the right to consider, and doubtless did, that the defendants made no explanation whatever of their

> acquisition and possession of this large quantity of sugar, there seems to be no doubt that the jury's verdict was amply supported.

On the basis of these references to their silence, petitioners ascribe to the court of appeals a holding that once the government had established the element of possession, defendants' failure to prove an intended lawful use was alone sufficient to justify an inference that the intended use was unlawful. This alleged holding, they suggest, deprives them of a constitutional right, presumably (although this is not spelled out in the petition) their privilege against self-incrimination. In fact, however, the court of appeals neither stated nor implied that the lack of explanation could itself be taken as affirmative evidence of guilt or used to supply an unproved element of the offense (*i.e.*, the intended unlawful use of the sugar). On the contrary, the court expressly concluded that the government's affirmative evidence—both as to possession and as to intended unlawful use—was sufficient to support the jury's verdict. The purport of its further remarks, quoted above, was simply that when the government's evidence is sufficient to establish a prima facie case of guilt, a defendant who remains silent assumes the risk that the jury will in fact draw the guilty inference warranted by that evidence. Cf. *Holland* v. *United States*, 348 U.S. 121, 138–139. Moreover, the court's comments ~~with respect~~ were not addressed to petitioners' failure personally to take the stand, but rather to the failure of the defense to offer any explanation of the incriminating circumstances surrounding petitioners' possession

of the sugar, "either by their own testimony or that of others" (App. to Pet. 11).

In any event, the remarks of the court of appeals with which petitioners take issue were wholly unnecessary to its decision. The jury, acting upon instructions which made no reference whatever to the petitioners' silence, found petitioners guilty. That verdict, as we have shown, and as the court of appeals explicitly held, was amply supported by affirmative evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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